SPM MEMBRANE SWITCH SDN BHD v. KERAJAAN NEGERI SELANGOR

HIGH COURT MALAYA, SHAH ALAM
WAN AHMAD FARID SALLEH JC
[WRIT SUMMONS NO: MT3-21-129-2005]
16 MARCH 2018

CONTRACT: *Breach – Damages – Assessment of – Loss of profit – Formula premised on expenditure of plaintiff related to performance of agreement – Whether plaintiff entitled to sum reflected in statement of claim – Interest – Pre-judgment interest and post-judgment interest pursuant to O. 42 r. 12 Rules of Court 2012 – Whether interest awarded at rate of 5% per annum from date of writ to date of realisation – Civil Law Act 1956, s. 11*

The State Government of Selangor ('the defendant'), by an agreement, ('the agreement') had appointed the plaintiff to assist in the collection of outstanding quit rent in the State. Subsequently, the defendant sought to terminate the agreement on grounds that the plaintiff had breached various terms of the agreement. Therefore, in a purported exercise of its right under cl. 8.1(b) of the agreement, the defendant issued a letter of notice of termination, giving 30 days' notice. The legality of the purported termination was challenged by the plaintiff. The plaintiff then commenced this action against the defendant, for the outstanding sum, for services rendered prior to the termination amounting to RM2,558,548.51 and for wrongful termination and loss of profit. The plaintiff submitted that the termination was defective and premature and bad in law. The case went all the way to the Federal Court which held that the defendant's main contention that the plaintiff was prevented from claiming any loss of profits since damages for loss of profits was not one of the prescribed remedies under cl. 8.5 of the agreement was no longer sustainable since there was no valid termination pursuant to cl. 8 of the agreement. Under a proper construction of the agreement, the apex court further held that it was apparent that the breach of the agreement had given rise to damages for loss of profit pursuant to s. 74 of the Contracts Act 1950. The Federal Court remitted the case to this court for the purpose of assessment. It was the plaintiff's case that the only remaining issue in dispute was the expenses and costs that would have been incurred by the plaintiff had it been allowed to continue with the agreement. The plaintiff also urged this court to award interest at 8% per annum from the date of the writ until the date of this judgment and thereafter at the rate of 5% per annum being post-judgment period until full realisation. The State Assistant Legal Advisor ('SALA'), however, submitted that an award of damages should not put the plaintiff in a better position than if the contract had been performed.

Held (order accordingly):

(1) The correct approach in determining the loss of profit would be to take into account the expenses that would be borne by the plaintiff in providing the services under the agreement. SD1 conceded that a certified amount of RM13,616,058.38 had been paid to the plaintiff before the termination of the agreement. However, the aforesaid amount did not take into account the sum of RM2,558,548.11 paid by the defendant to the plaintiff after the trial which was in fact the commission due to the plaintiff from January to May 2004. While this court could appreciate the argument of the SALA that the sum of RM2,558,548.11 was the fruits of the judgment which favoured the plaintiff, the said judgment also made specific reference to the period of services rendered by the plaintiff to the defendant from January to May 2004. Therefore, there was no doubt that this sum of RM2,558,548.11 should be part of the total certified sum for the purpose of obtaining an average monthly commission. (paras 9, 31 & 32)

(2) The formula direction given by the Federal Court was not premised on the entire expenditure of the plaintiff but the expenditure of the plaintiff that was related to the performance of the agreement. SP2 had taken pains to segregate the expenses related to the contract and those that were not related. This segregation approach was never seriously challenged during cross-examination. This court accepted the explanation of SP2. (para 34)

(3) Although the loss of profit could not be calculated with mathematical precision, according the Federal Court's guideline, it was the estimated gross loss of income less all the expenses that would be reasonably incurred in the remaining period. In the circumstances, the approach taken by SP2 would be nearer to the mark and it was held to be reasonable and the closest to the formula guideline given by the Federal Court. The plaintiff was thus entitled to the sum of RM10,109,940.28 as reflected in the statement of claim. (paras 35 & 36)

(4) This court retained the discretion to award interest by virtue of s. 11 of the Civil Law Act 1956 on the pre-judgment interest and post-judgment interest pursuant to O. 42 r. 12 of the Rules of Court 2012. Interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use. Thus, this court awarded interest at the rate of 5% per annum from the date of the writ to the date of realisation. (paras 37 & 40)

Case(s) referred to:

Bungsar Hill Holdings Sdn Bhd & Ors v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur & Another Appeal [2015] 1 CLJ 553 HC ***(refd)***

Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***

Mohamad Ezam Mohd Nor & Ors v. Tan Sri Norian Mai & Ors [2013] 3 CLJ 81 HC ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Terengganu State Economic Development Corporation v. Nadefinco Ltd [1982] 1 LNS 46 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11

Contracts Act 1950, s. 74

Rules of Court 2012, O. 42 r. 12

For the plaintiff - Hazman Ahmad, Razlan Hadrib & Nadirah Izyan Azaddin; M/s Omar Ismail Hazman & Co

For the defendant - Muhammad Haziq Hashim; State Assistant Legal Advisor, Selangor

Reported by Suhainah Wahiduddin

JUDGMENT

Wan Ahmad Farid Salleh JC:

[1] This case has a long and chequered history. The facts of the case can be summarised as follows. By an agreement dated 27 September 2001 ('the agreement') the State Government of Selangor, the defendant in the instant case, had appointed the plaintiff to assist it with the collection of outstanding quit rent in the State.

[2] The agreement included a term that allowed the defendant to terminate the agreement unilaterally by giving 30 days' notice to the plaintiff in the event that one of eight grounds, as set out in cl. 8.1(b) of the agreement, was to occur.

[3] The defendant sought to terminate the agreement it had entered into with the plaintiff on the grounds that the latter had breached various terms of the agreement. Therefore, in a purported exercise of its right under cl. 8.1(b) of the agreement, the defendant issued a letter of a notice of termination on 22 November 2004 giving 30 days' notice.

[4] On 27 December 2004 the termination was effected by way of a subsequent letter. However, both letters did not specify any reason for the purported termination. The legality of the purported termination was challenged by the plaintiff.

[5] The plaintiff then commenced this action against the defendant for the outstanding sum for services rendered prior to termination amounting to RM2,558,548.51 and for wrongful termination and lost of profit.

[6] The plaintiff submitted that the termination was defective and bad in law in that it failed to provide any reasons for the said termination. According to the plaintiff, particularised reasons should be provided for in the notice of termination. The plaintiff further argued that cl. 8.1(b) could only be invoked after the procedure in cl. 9, pertaining to conducting a performance review of the plaintiff company's performance of its services under the agreement, had been satisfied. In short, the notice of termination was not only defective, but also premature.

[7] The case went all the way to the Federal Court which held that, the defendant's main contention that the plaintiff was prevented from claiming any loss of profits since damages for loss of profits was not one of the prescribed remedies under cl. 8.5 of the agreement was no longer sustainable since there was no valid termination pursuant to cl. 8 of the agreement.

[8] Upon a proper construction of the agreement, the apex court further held that it was apparent that the breach of the agreement had given rise to damages for loss of profit pursuant to s. 74 of the Contracts Act 1950. Towards the end of the judgment of the Federal Court which was delivered by Zainun Ali FCJ, it was said as follows:

> We order that this claim ought to be remitted to the High Court for assessment of damages on the issue of quantum occasioned by wrongful termination of the contract. Costs RM50,000 to the appellant.

[9] The Federal Court held that the evidence tendered before the learned trial judge did not reflect the actual losses suffered by the plaintiff. The Federal Court pointed that the correct approach in determining the loss of profit would be to take into account of the expenses that would be borne by the plaintiff in providing the services under the agreement. Zainun Ali FCJ in her speech further held as follows:

> To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20-month period.

The Assessment: The Plaintiff's Case

[10] The assessment was conducted before me on 21 November 2016 where two witnesses testified for the plaintiff and one for the defendant. The first witness for the plaintiff was Faizul Nizan bin Zulkefli, PW1 who is auditor with Messrs Salihin, chartered accountant. The second witness was Abu Hassan bin Hashim, PW2 who is the managing director of the plaintiff company. The only witness for the defendant was Faizah Mohd Shafawi, DW1, who at the material time was the Assistant State Financial Officer (Revenue).

[11] According to PW2, the average income received by the plaintiff when the agreement was in force for the respective Districts are as follows:

(a) Klang : RM239,779.00

(b) Gombak : RM204,704.91

(c) Kuala Selangor : RM 34,430.62

(d) Sabak Bernam : RM 9,467.66

As to the multiplier, DW1 in answer to Q11 to her witness statement stated that the remaining contract period based on the agreement would be 22.3 months for the District of Klang, 31.3 months for the District of Gombak, Kuala Selangor and Sabak Bernam respectively. In her testimony, DW1 referred to the multiplier as "jumlah bulan hilang pendapatan".

[12] Based on the aforesaid multiplicand and multiplier the total sum for the gross loss of income sustained by the plaintiff would be RM13,128,351.52 as can be seen at p. 19 of ikatan A. The summary would be as follows:

No.	District	Average	Balance of Monthly Income (RM)	Total (RM) Contract Period (Months)
1.	Klang	239,779	22.3	5,347,071.72
2.	Gombak	204,704.91	31.3	6,407,263.64
3.	Kuala Selangor	34,430.62	31.3	1,077,678.55
4.	Sabak Bernam	9,467.66	31.3	296,337.62
	TOTAL			13,128,351.53

It is therefore the plaintiff's case that the only remaining issue that is in dispute would be the expenses and costs that would have been incurred by the plaintiff had it been allowed to continue with the agreement.

[13] PW1 in his witness statement confirmed that the methodology of ascertaining the total costs would be to multiply the average costs per month with the remaining months. PW1 also explained that costs in this context would mean administration expenses, operating expenses and finance costs as can be seen at p. 2 of the ikatan dokumen tambahan plaintif.

[14] PW2 explained the calculation in the following manner at his answer to Q24 of his witness statement:

> [24] Menurut rekod dan Laporan Audit Plaintif untuk tahun berakhir 2002 sehingga 2006, kos perbelanjaan Plaintif untuk menjalankan perkhidmatan di bawah Perjanjian adalah RM4,190,064.00. Oleh itu kos purata sebulan adalah RM69,834.40.

A Memandangkan terdapat perbezaan antara baki tempoh di bawah Perjanjian antara daerah Klang dan daerah-daerah lain, maka secara purata tempoh baki adalah 26.8 bulan.

Selanjutnya, jika didarab 26.8 dengan jumlah purata perbelanjaan sebulan sebanyak RM69,834.40 maka jumlah kos perbelanjaan adalah
B RM1,871,561.92.

[15] Based on the audited accounts of the plaintiff for the year 2002 to 2007, the total administration and operating expenses together with the finance costs the average costs per month according to p. 8 of the ikatan tambahan plaintif would be RM69,834.40. It should be noted that the
C average balance of the contract period based on the aforesaid is 26.8 months (31.3 months for three Districts and 22.3 months for the District of Klang).

[16] PW2 in para. 24 of his witness statement explained that the net loss of income after deducting the total administration and operating expenses together with the finance costs would be RM11,256,789.61:

D

Total estimated loss of income	RM13,128,351.53
Less Total costs	RM 1,871,561.92
Net Loss of income	RM11,256,789.61

E However, there is a hiccup in this figure of RM11,256,789.61. The plaintiff had only pleaded for the sum of RM10,109,940.28. To be fair to the plaintiff company, it had attempted to amend the statement of claim at the end of the trial of the assessment so as to reflect the actual net loss as aforesaid, but to no avail. This court had dismissed the application which decision was
F eventually affirmed by the Court of Appeal.

[17] Encik Razlan Hadri, who is the leading counsel for the plaintiff, with his customary frankness and mindful that parties are bound by their pleadings, conceded that the plaintiff would have to be content with the sum of the maximum sum of RM10,109,940.28 pleaded in the statement of
G claim.

[18] On the question of interest, learned counsel for the plaintiff referred me to the case of *Bungsar Hill Holdings Sdn Bhd & Ors v. Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur & Another Appeal* [2015] 1 CLJ 553; [2015] 8 MLJ 317 where my learned brother Azizul Azmi Adnan JC
H (now J) explained the principle behind the payment of interest in the following words:

Where however, a person has by his conduct caused a payment that was rightfully due to another person to be delayed, fairness demands that the person compensates that other person for the opportunity cost incurred
I by having been kept out of funds. This principle applies not only in respect of pre-judgment interest under s. 11 of the Civil Law Act 1956, but also in the case of an award of post-judgment interest pursuant to O. 42 r. 12 of the Rules of Court 2012.

This is of course in consonant with the judgment of Salleh Abas FJ (as the former Lord President then was) in *Terengganu State Economic Development Corporation v. Nadefinco Ltd* [1982] 1 LNS 46; [1982] 1 MLJ 365 when he held:

> The sum total of all these cases is that interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use and that interest would be simple or at rests depending upon the circumstances of the case. It is simple interest if the accounting party simply keeps it or actually received such rate, but it is compound if the court could infer from circumstances that the money was used in the accounting party's business.

[19] Learned counsel then reminded me that this case was filed in 2005, well before the Rules of Court 2012, and therefore the applicable law in respect of the pre-judgment interest would be the former Rules of the High Court 1980. Section 11 of the Civil Law Act 1956 provides as follows:

> [11] In any proceedings tried in any court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section:
>
> (a) shall authorise the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

Learned counsel then referred me to the case of *Mohamad Ezam Mohd Nor & Ors v. Tan Sri Norian Mai & Ors* [2013] 3 CLJ 81 where it was held that:

> Interest on the judgment sum at the rate of 8% from the date of filing of the writ of summons to date of judgment and at the rate of 5% from the date of judgment to the date of realisation.

[20] In conclusion, learned counsel urged me to award interest as pleaded at 8% p.a. from the date of the writ until the date of this judgment should be granted and thereafter at the rate of 5% p.a. being post-judgment period until full realisation.

The Assessment: The Defendant's Response

[21] The learned State Assistant Legal Advisor ("ALA"), at the outset, argued that the plaintiff was under a duty to take reasonable steps to mitigate its loss immediately upon the breach and to act reasonably to mitigate its loss. He then referred me to the case of *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783; [1994] 3 MLJ 569

SC. In that case, the Supreme Court held that from the evidence, the plaintiff had continued to manufacture the gloves even after the breach although it would have been reasonable for it to stop further production in view of the declining market.

[22] On the mechanism of calculation of the loss, the learned ALA submitted that an award of damages should not put the plaintiff in a better position than if the contract had been performed. In other words, the plaintiff should not recover more than it has lost. He then referred me to the Federal Court case of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 FC.

[23] The learned ALA then attracted my attention that the plaintiff is principally engaged in the business of maintenance of the State Government's quit rental account and other related activities as reflected in the company's "reports and financial statements".

[24] The defendant's methodology in calculating the assessment can be summarised as follows. First, the defendant would total the operating expenses of the plaintiff for the year 2005, 2006 and 2007 based on its audited accounts. Based on the aforesaid, the total operating expenses for the three years would be as follows:

	Year	Total Operating Expenses (RM)
1.	2005	1,500,789
2.	2006	1,223,537
3.	2007	1,053,788
	TOTAL	RM1,053,788

[25] Secondly, the defendant would calculate the average income of the plaintiff based on the certified amount by the respective district Land Administrators and not by the amount of claim by the plaintiff. In her answer to Q11 of the witness statement, SD1 explained that based on the aforesaid calculation, the loss of income from the date of the termination of the agreement and the actual date when the agreement was supposed to have ended would be RM8,476,997.88.

[26] Based on the defendant's methodology, the result would be:

Loss of income	:	RM8,476,997.88
less the total operating expenses	:	RM3,778,114.00
TOTAL	:	RM4,698,883.88

It is the submission of the learned ALA that in the event that this court is minded to award the plaintiff a more reasonable sum would be RM4,698,883.88.

The Analysis

[27] Let me address on the duty of the plaintiff to mitigate as urged by the learned ALA first. While the duty to mitigate is well-established in the law of contract in the event of any breach is never doubted, the learned ALA did not indicate as to what would be the reasonable steps that the plaintiff should have taken in order to mitigate its loss. Mohamed Dzaiddin SCJ (as the former CJ then was) in *Malaysian Rubber Development reminded* us that:

> The question of what is reasonable or whether the plaintiff has acted reasonably in mitigation of his damages in every case is a question of fact and not law (*Payzu Ltd v. Saunders* [1919] 2 KB 581 at p 588; The Solholt [1983] 1 Lloyd's Rep 605, CA).

In the case of goods sold and delivered as in *Malaysian Rubber Development* it would be much easier to mitigate the loss. What the plaintiff should have done in the aforesaid case according to the Supreme Court was to stop producing the rubber gloves in order to avoid incurring further losses.

[28] The nature of business of the plaintiff is far more complicated than manufacturing and selling rubber gloves. It is in fact highly specialised. Unless I am enlightened otherwise, by the defendant, I could not surmise as to how the plaintiff could mitigate its loss in the circumstances.

[29] In any event, as pointed by learned counsel for the plaintiff, the duty to mitigate was never pleaded in the defendant's defence dated 26 February 2006 neither was it put to the plaintiff's witnesses. It is too late in the day for the defendant to raise this issue.

[30] On the methodology of assessing the loss of profit, we are reminded by the Federal Court in this very same case that:

> The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court.

In other words, the Federal Court itself in remitting the case to this court for the purpose of assessment, recognised that the future loss of profit is at best an estimation. The assessment of damages can never be calculated with mathematical precision or a rigid straitjacket formula. But as Polonius told us in a scene in *Hamlet*, "there's a method in the madness".

[31] To begin with, the starting point is that SD1 conceded that a certified amount of RM13,616,058.38 had been paid to the plaintiff before the termination of the agreement. However, the aforesaid amount did not take into account the sum of RM2,558,548.11 paid by the defendant to the plaintiff after the trial which was in fact the commission due to the plaintiff from January to May 2004. This was in fact conceded by SD1.

Court: Yang itu bayarlah, jumlah RM13 juta yang diperakukan itu dalam jawapan 11 tu kan, disebutkan, adakah ia termasuk Januari hingga Mei 2004?

SD1: Jika mengikut rekod:

Court: Ikut rekod.

SD1: ... tidak termasuk.

Court: Tak termasuk? Masuk ke tak termasuk?

SD1: Tak termasuk Yang Arif.

[32] While I can appreciate the learned ALA's argument that the sum of RM2,558,548.11 was the fruits of the judgment dated 29 November 2011 which favours the plaintiff, the said judgment also made specific reference to the period of services rendered by the plaintiff to the defendant from January to May 2004. There is therefore no doubt that this sum of RM2,558,548.11 shall be part of the total certified sum for the purpose of obtaining an average monthly commission.

[33] If the sum of RM2,558,548.11 were to be taken into account, then the certified sum as SD1 would prefer to refer it, would have been RM16,174,606.49. It is indeed unfortunate that SD1, despite having been made aware of the change in the "certified sum" did not offer to recalculate the average loss of monthly income during re-examination. She was not even re-examined. If the basis of calculation on the part of SD1 has collapsed, then the attendant consequences of it would be the net result of the calculation would equally collapse. It is indeed a house of cards.

[34] It should be recalled that the formula direction given by the Federal Court was not premised on the entire expenditure of the plaintiff but the expenditure of the plaintiff that is related to the performance of the agreement. SP2 had taken pains to segregate the expenses related to the contract and those that are not related to the same as can be seen at pp. 6 to 7 of bundle B. This segregation approach was never seriously challenged during cross-examination. I therefore accept the explanation of SP2.

[35] Although the loss of profit could not be calculated with mathematical precision, it is not rocket science either. In fact, if we were to recall the guideline given by Her Ladyship Zainun Ali FCJ, the estimated gross loss of income less all the expenses that would be reasonably incurred in the remaining period.

[36] In the circumstances, the approach taken by SP2 would be nearer to the mark and I would therefore hold it as being reasonable and the closest to the formula guideline given by the Federal Court. The only impediment is that the plaintiff is constrained by its own pleadings. I therefore hold that the plaintiff is entitled to the sum of RM10,109,940.28 as reflected in the statement of claim.

On The Question Of Interest

[37] On the question of interest, while the Federal Court did not mention anything about interest, this court still retains the discretion to award the same by virtue of s. 11 of the CLA on the pre-judgment interest and post-judgment interest pursuant to O. 42 r. 12 of the Rules of Court 2012. I am ever mindful that interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use.

[38] All things must come to an end, even a long and drawn up saga as learned counsel for the plaintiff put it at the exordial stage of his written submission. I think parties accept that the agreement was wrongfully terminated. Even the learned ALA accepted that the plaintiff is entitled to the interest. It is only a question of quantum.

[39] I have taken into account the migration from RHC to ROC and that the writ was filed before the new ROC in 2012. But I also take into account that the defendant was amenable to a possible settlement so much so that the assessment dates have to be postponed on a few occasions to enable parties to explore an amicable solution. Unfortunately, it did not work. The conduct of the defendant at all material times are reasonable.

[40] In the circumstances, I am awarding interest at the rate of 5% per annum from the date of the writ to the date of realisation. There will be no order as to costs.